

MINUTES
BOARD OF ENVIRONMENTAL REVIEW
FRIDAY, NOVEMBER 16, 2001

Call to Order: The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:10 a.m., on Friday, November 16, 2001, in the Director's Conference Room, Metcalf Building, Room 111, 1520 East Sixth Avenue, Helena, Montana.

Attendance: Board members present at the meeting were: Joe Russell, Chairman, Kalispell; Susan Brooke, Bozeman; David Fishbaugh, Billings; Kim Lacey, Glasgow; Garon Smith, Missoula; and Ward Shanahan, Helena.

Also present were Katherine Orr, Attorney for the Board, and Jim Scheier and Thomas Bowe, attorneys, Agency Legal Services, Attorney General's Office, Department of Justice.

Marla Noack Paddock, Court Reporter, Bozeman, recorded the meeting and a transcript will be available for the Board and interested parties on request to the Department.

DEQ Personnel: Jan Sensibaugh, Director; Curt Chisholm, Deputy Director; John North, Chief Legal Counsel; David Rusoff, Deputy Chief Legal Counsel; Claudia Massman, Legal Counsel; John Arrigo, Administrator, Enforcement Division (ED); Don Vidrine, Air and Waste Management Bureau (P&CD); Steve Welch, Division Administrator, Permitting and Compliance Division; Bonnie Lovelace, Bureau Chief, Water Protection Bureau; Judy Hanson, Administrative Officer/Fiscal Officer, Permitting and Compliance Division; Tom Reid, Section Supervisor, Water Quality Discharge Permit Section, Water Protection Bureau, Permitting and Compliance Division; Debra Wolfe, Resource Protection Planning Bureau, Planning, Prevention & Assistance Division; Vickie Walsh, Air and Waste Management Bureau; Elois Johnson, Paralegal, Legal Unit, Director's Office; and Sonja Cox, Administrative Assistant, Director's Office

Interested Persons: Nicole Prokop, representing Holnam; Don Quander, Holland and Hart, representing Western Environmental Trade Association (WETA); Anne Hedges, representing MEIC, Cathy Laughner, Browning, Kaleczyc, Berry & Hoven; Krista Lee Evans, representing the Environmental Quality Council; Don Allen, representing WETA; Don Bachman, E.Y.C.; Mary Beth Marks, USDA-FS; Michael Cormier, Marin Technologies; Ronna Christman, Montana Petroleum Marketers; Doug Dodge, Town Pump, Inc.; Dexter Busby, Montana Refining Company

I. Administrative Items

- 1 Review and Approve Minutes of September 6, 2001, Teleconference Meeting.

Mr. Smith MOVED that the Board APPROVE the minutes of the September 6, 2001, teleconference meeting. Mr. Fishbaugh SECONDED the motion and the motion CARRIED unanimously.

- 2 Review and approve minutes of September 21, 2001 meeting.

Mr. Smith pointed out to the board that where David Klemp, on page 3, sixth paragraph from the top of the page, stated "there is no data" he should have stated "there are no data" as data is plural and "datum" is singular.

Mr. Hudson asked the question whether Doug Dodge, representing Town Pump of Belgrade, had more than one station or if he was the manager of just the one station. (p. 9) Mr. Chisholm explained to the Board that Mr. Dodge works for Town Pump Corporation in their corporate offices in Butte and, therefore, represents the corporation of the affiliated stations.

Discussion was held as to whether the paragraph stating that Mr. Smith volunteered to compile information explaining recovery systems, etc. should be expanded upon. Mr. Hudson pointed out that Mr. Smith actually stated at this meeting that he would contact MSU to ask for assistance in collecting the "before and after" data from the installation of a Stage I vapor recovery system. Mr. Smith stated he had the sampling devices and could send them to MSU. They would have only to deploy them and then Mr. Smith would send them back. The decision was made to include in the minutes that Mr. Smith would contact MSU for its assistance.

Mr. Smith MOVED that the Board APPROVE the minutes of the September 21, 2001, meeting with the above changes. Ms. Brooke SECONDED the motion and the motion CARRIED unanimously.

II. Briefing Items

- 3 Contested Case Update

- (1) Cases assigned to Hearing Officer, Jim Scheier

Holnam, Inc. Air Quality Permit No. 0982-10

A Stipulation for Settlement in this matter was signed on November 15, 2001. Katherine Orr noted that the parties are withdrawing from the appeal and are asking the Board to approve that by signing an order of dismissal with changes to permit requirements.

Mr. Shanahan MOVED to enter the order to dismiss with prejudice and modifications to permit. Ms. Brooke SECONDED the motion and the motion CARRIED unanimously.

- (2) Cases assigned to Hearing Examiner, Kelly O'Sullivan

Columbia Falls Aluminum Company's (CFAC) Air Quality Permit No. OP2655-00)

This agenda item was moved to Item 3 of the agenda and was taken up then.

Hendrickson Pit Enforcement Action

This agenda item was moved to Item 3 of the agenda and was taken up then.

Livingston Rebuild Center (LRC) Enforcement Action

Ms. Orr stated that this case is just continuing on through its course of discovery and investigation by the parties, and that there is nothing pending before the board at this time.

III. Action Agenda Items

- 4 RULE REPEAL, AMENDMENT AND ADOPTION - REPEAL,
AMENDMENT AND/OR ADOPTION OF FINAL RULES

- (1) IN THE MATTER OF Air Quality Fee Rule for Major Sources

Katherine Orr spoke to the matter of comments submitted by the public. Comments received addressed both Alternative I and Alternative II. The Department recommended adoption of Alternative I. Ms. Orr explained that Alternative I involves a cap and a certain higher percentage for the tonnage emission rate, and Alternative II removes the cap and would lower the per tonnage emission rate.

Mr. Shanahan MOVED that the Board ADOPT the Department's recommendations. Ms. Brooke SECONDED the motion so that discussion could be held.

Chuck Homer, Air and Waste Management Bureau of DEQ, spoke to the Board regarding the per ton figures in each Alternative. Mr. Homer explained that, under Alternative I the per ton amount would be \$20.86, and under Alternative II, without the cap, the per ton amount would be \$16.93. Discussion was held regarding how the Department determined what fees should be charged.

Mr. Don Quander, attorney for Holland and Hart, spoke for Chuck Hansberry. Mr. Hansberry signed the letter to the Board asking the Board to adopt Alternative II of the proposed notice. Mr. Quander stated that he did not think it was appropriate that every other facility should subsidize PP&L. He indicated his belief that PP&L could theoretically double its amount of pollution output and not see an increase in charges. He stated he was concerned that this would set a wrong incentive and be inappropriate.

Chairman Russell called for a vote on the motion currently on the floor. There was ONE vote in SUPPORT of the motion and FIVE in OPPOSITION. The motion DIED.

Chairman Russell called for a motion to adopt Alternative 2.

Mr. Smith MOVED to ADOPT Alternative II. Ms. Lacey SECONDED the motion. The motion CARRIED unanimously.

Ms. Orr informed the Board that it should address the adoption of the entire notice of amendment, not just Alternative II.

Mr. Smith MOVED to ADOPT the Hearing Examiner's Report for Alternative II.

In response to discussion, Mr. Rusoff spoke to the Board regarding the adoption of Alternative II. He informed the Board that the bracketed language "an amount not to exceed \$21.50" would be deleted and the amount of \$16.93 would be underlined to show that amount as being adopted. Mr. Rusoff complied an amended notice reflecting this change and submitted it to the Board before the adjournment of the meeting.

Chairman Russell tabled the motion on the floor until the Board could review the amended notice Mr. Rusoff was preparing.

(2) IN THE MATTER OF MFSA Rule Pertaining to Regulation of Energy Generation or Conversion of Linear Facilities

John North spoke to the Board regarding the notice. This notice was filed previously with the Secretary of State's office, but the six-month adoption deadline was inadvertently missed. Mr. North recommended the Board adopt the notice as proposed.

Mr. Shanahan MOVED to ADOPT the Department's rule or recommendation. Ms. Brooke SECONDED and the motion CARRIED unanimously.

(3) IN THE MATTER OF MFSA Rule Pertaining to Repeal of Centerline Approval Process

Mr. North explained to the Board that the purpose of this rulemaking was to make the Major Facility Siting Act rules comply with the statute as it was amended by the Legislature.

Mr. Smith MOVED to ACCEPT the House Bill 521 and 311 analyses. Mr. Shanahan SECONDED the motion and the motion CARRIED unanimously.

5 INITIATION OF RULEMAKING AND APPOINTMENT OF HEARING
 OFFICER

(1) MPDES Fee Rule Modifications

Bonnie Lovelace, Bureau Chief of the Water Protection Bureau, presented testimony regarding the Department's need for initiation of this notice for fee increases. This notice addresses the need for fees that are sufficient to cover the Board's and Department's cost of reviewing and action upon an application for a permit, certification, license or other authorization required by the Act.

Discussion was held regarding the fee structure, etc.

Mr. Shanahan MOVED to APPROVE the rulemaking request as stated in the addendum to Agenda item 51 and to appoint Thomas Bowe as Hearing Examiner. Mr. Smith SECONDED the motion.

Further discussion was held regarding the fees. Don Allen, representing the Western Environmental Trade Association, commented that the association is satisfied at this point that the Department needs to proceed with the fee increase and that the association feels it is justified.

Chairman Russell called for a vote on the motion on the floor. The motion CARRIED unanimously.

6 FINAL ACTION ON APPEALS:

(1) In the matter of Columbia Falls Aluminum Company's Air Quality Permit
 No. OP2655-00

Ms. Orr indicated to the Board that the Department and Columbia Falls Aluminum Company (CFAC) have reached an agreement wherein this matter would be dismissed with prejudice. Ms. Orr also indicated that the Department had drafted a proposed Order in this matter. She indicated that the decision of the Board would be whether to approve the dismissal and have the Chairman sign the Order to Dismiss with Prejudice.

Mr. Smith stated that he felt the change in the compliance schedule, attached to the stipulation, should also be authorized as part of the Board's motion.

Chairman Russell asked for a motion approving the stipulation and Order accepting the compliance schedule as attached as Exhibit A, and authorizing the board chair to sign the order that is presented in the packet.

Ms. Brooks so MOVED. Mr. Hudson SECONDED the motion and the motion CARRIED unanimously.

Mr. Hudson asked the general question as to whether CFAC was performing maintenance at the plant during the shut-down. Chairman Russell asked if anyone representing CFAC was at the meeting and could answer the question.

Ms. Laughner, an attorney with Browning, Kaleczyc, Berry and Hoven, commented that CFAC would submit a status report to the Board at its next regularly scheduled meeting.

(2) In the Matter of the Hendrickson Pit Enforcement Action

Ms. Orr presented to the Board that the Department and Hendrickson had resolved this matter and that the Department has a proposed Order to Dismiss with Prejudice for the Chairman to sign if approved by the Board.

Chairman Russell asked for a motion to dismiss the case with prejudice and authorize the Chairman to sign the Order.

Ms. Brooke so MOVED. Mr. Fishbaugh SECONDED the motion and the motion CARRIED unanimously.

7 NEW CONTESTED CASE APPEALS

(1) In the matter of Town of Geraldine's Montana Pollutant Discharge Elimination Permit (MPDES) No. MT-002-0826

Ms. Orr presented the matter to the Board indicating that an appeal had been received and that the matter is now a contested case.

Ms. Brooke MOVED to appoint Kelly O'Sullivan as interim hearing examiner and to allow her to assign the case to someone else at a later date if required. Mr. Shanahan SECONDED.

Chairman Russell called for discussion in this matter. Chairman Russell asked staff whether this issue is a major ordeal for the Town of Geraldine.

Ms. Sensibaugh, Director for the Department of Environmental Quality, responded to Board questions pertaining to ammonia standards.

Chairman Russell asked Ms. Brooke and Mr. Shanahan if they would approve adding the appointment of an interim hearing examiner to their motion. Both approved.

The motion MOVED by Ms. Brooke and SECONDED by Mr. Shanahan CARRIED unanimously.

8 VAPOR RECOVERY PROPOSAL - DISCUSSION AND DECISION
BY BOARD:

Mr. Smith spoke to the other Board members indicating that he felt that there would be enough of an economic benefit to the petroleum suppliers that, if the Board could effectuate a voluntary move in the direction of installation of Stage I vapor recovery systems, that would be the best way to go for all involved. Mr. Smith expanded on this issue.

Ronna Christman, representing Montana Petroleum Marketers Association, inquired whether the Board has really defined what the problem is in Montana and what kind of standard is the Board going to set. Ms. Christman expressed her concern, on behalf of the Association, that the installation of Stage I vapor recovery systems would be very expensive to the industry. She also stated that she did not see any cost recovery to the industry with the installation and expanded on her support of that belief.

Board members asked questions of Ms. Christman regarding her testimony.

Vickie Walsh, Air and Waste Management Bureau of the Department, spoke to the Board regarding federal standards that require control be placed on different bulk terminals and why the Conoco Refinery has a vapor recovery systems and why Exxon does not.

Dexter Busby, representing Montana Refinery of Great Falls, indicated to the Board that the Montana Refinery collects and flares gases. He informed the Board of the cost of the flare recovery system Montana Refinery purchased and what a refrigeration system would have cost. He explained briefly the differences between a flare and refrigeration recovery system.

The Board held discussion pertaining to how the vapors could possibly be used in other areas, such as a heat source, or plumbed into a boiler.

Doug Dodge, representing Town Pump, spoke next regarding Stage I vapor recovery systems. He explained to the Board how Town Pump is handling this issue. Mr. Dodge informed the Board that most of Town Pump's newer tank installations are quite close to being set up for vapor recovery.

Ms. Brooke indicated to the other Board members that she did not feel rulemaking should be initiated pertaining to this matter. She stated she felt it was a problem that the Legislature needed to pursue. Mr. Shanahan concurred with Ms. Brooke on this issue.

Ms. Brooke MOVED that the Board allow the legislature to address this issue in the next session. Mr. Shanahan SECONDED the motion and the motion CARRIED unanimously.

9 APPROVAL OF PARTIAL BOND RELEASE FOR EXPRESS
PIPELINE

Mr. North stated that Express Pipeline had requested that the Board defer this item so that it could discuss with the Department some of the representations and findings the Department made and the procedure for bond retainage. The Department agreed to the deferral.

III. Action Agenda Items (Continued)

- 4 RULE REPEAL, AMENDMENT AND ADOPTION - REPEAL,
AMENDMENT AND/OR ADOPTION OF FINAL RULES
- (1) IN THE MATTER OF Air Quality Fee Rule for Major Sources
(Continued)

Chairman Russell requested that the Board refer back to Item III (1) pertaining to the air quality fee rule notice.

Ms. Shanahan MOVED to remove the air quality fee notice from the table. Mr. Hudson SECONDED the motion and the motion CARRIED unanimously.

Mr. Smith MOVED to adopt the corrected notice of amendment, the hearing examiner's report and the House Bill 311 and 521 analyses therein and authorize the Chairman to sign it. Ms. Lacey SECONDED the motion and the motion CARRIED unanimously.

10 SET MEETING SCHEDULE FOR CALENDER YEAR 2002

Mr. North presented the Board with three proposals for a meeting schedule for 2002. The Board held discussion.

Ms. Brooke MOVED that Schedule A be adopted with the change to March 29 for the March meeting. Mr. Smith SECONDED the motion and the motion CARRIED unanimously.

IV OTHER BUSINESS

Ms. Orr indicated to Chairman Russell, at this point, that the Board should discuss the United Harvest Appeal and the October 24, 2001 Order before the Board. Ms. Orr explained to the Board that she felt the Board had a pretty good basis for a motion to dismiss as the Board is the party and it is a quasi-judicial board. She stated she felt that would end the Board's responsibilities with regard to the appeal. Discussion was held regarding this appeal.

Ms. Brooke MOVED to appoint Tom Bowe as the Board's counsel in the United Harvest matter in District Court. Mr. Shanahan SECONDED the motion and the motion CARRIED unanimously.

11 BRIEFING AGENDA ITEMS:

- (1) Report by the USFS on status of their work on the New World Mine.

Mary Beth Martz and Mike Cormier, representing the United States Forest Service, presented a verbal and slide report relative to their responsibilities under the temporary water quality standards, granted by the Board, of the New World Mine site.

- (2) Presentation of Conflict of Interest paper.

Director Sensibaugh explained why the Board received this paper. The paper deals with how board members private activities relate to their board activities. John North summarized the paper and responded to Board questions.

- (3) Air Quality Permit Appeal Process - The Western Environmental Trade Association will make a presentation regarding the air quality permit appeal process.

Don Allen, representing WETA, made a presentation to the Board regarding the air permit appeals process and the concerns his association has with the uncertainty and delay associated with air quality permit appeals.

Mr. Quander, an attorney with Holland and Hart, then spoke to the Board on behalf of WETA regarding recommendations the association has regarding this matter.

- (4) Other Matters

Chairman Russell requested that the Board address a question to the Attorney General regarding the Board's decision-making process pertaining to MEPA. Chairman Russell requested this item be placed on the next agenda for the Board's review.

V. ADJOURNMENT:

Ms. Brooke MOVED to adjourn the meeting. Ms. Lacey SECONDED the motion and the motion CARRIED unanimously. The next meeting of the Board of Environmental Review is scheduled for January 25, 2002.

Board of Environmental Review Minutes Approved:

JAN P. SENSIBAUGH, DIRECTOR
DEPARTMENT OF ENVIRONMENTAL
QUALITY

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL
REVIEW

DATE